

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

-against-

KEVIN CASSIDY, EDWARD
O'CONNOR, OPTIONABLE, INC.,
DAVID LEE AND ROBERT MOORE,

Defendants.

No. 08-CV-09962 (GBD)(JLC)

ECF FILED

CMEG NYMEX HOLDINGS, INC.,

Plaintiff,

-against-

OPTIONABLE, INC., KEVIN CASSIDY,
PIERPONT CAPITAL, INC., EDWARD
O'CONNOR, RIDGECREST CAPITAL,
INC., and MARK NORDLICHT,

Defendants.

No. 09-CV-03677 (GBD)(JLC)

ECF FILED

BANK OF MONTREAL,

Plaintiff,

-against-

OPTIONABLE, INC., MF GLOBAL INC.,
KEVIN P. CASSIDY, EDWARD J.
O'CONNOR, MARK A. NORDLICHT,
RYAN B. WOODGATE, SCOTT
CONNOR and JOSEPH D. SAAB,

Defendants.

No. 09-CV-07557 (GBD)(JLC)

ECF FILED

DECLARATION LIAM O'BRIEN, ESQ.

I, **LIAM O'BRIEN**, declare under the penalties of perjury as follows:

1. I am managing partner of the law firm of McCormick & O'Brien, LLP ("M&O"), counsel for Defendant Optionable, Inc. ("Optionable" or "Defendant") in the above-captioned matters. I submit this Declaration in support of M&O's Motion to Withdraw as Counsel of Record for Optionable submitted herewith. I am fully familiar with the facts and circumstances stated herein.

2. The above-captioned cases are related to one another and were commenced by the filing of Complaints in November 2008 (*CFTC v. Cassidy*), April 2009 (*CMEG NYMEX Holdings Inc. v. Optionable*) and August 2009 (*Bank of Montreal v. Optionable*). Initially, Optionable was represented in each of these matters by former counsel Wilmer Hale. Motions to dismiss each of the Complaints were filed by multiple defendants in each of these cases, which motions were denied by the Court in its Memorandum Decision and Order dated June 18, 2010. Motions to dismiss certain cross-claims filed by defendant Scott Connor, however, are still pending before the Court.

3. At or about the time of the Court's Memorandum Decision and Order, M&O was retained by Defendant Optionable to substitute as its counsel in all of the pending related cases filed against the Defendant. Subsequently, M&O filed answers in the three pending cases on behalf of Optionable, and document discovery in most of the cases commenced thereafter.

4. On April 20, 2010, this Court ordered a limited stay of all discovery involving depositions and interrogatories in these cases pending the disposition of a related case, *United States v. Kevin Cassidy*, 08 Cr. 1101 (TPG). The *Cassidy* case is currently scheduled to commence trial in August 2011.

5. Although the exchange of document discovery is underway, document productions in half of the related cases did not commence until December 2010 or thereafter. Since fact discovery has not been completed in any of these cases, they are in a relatively early stage of the litigations. Depositions and interrogatories may not be scheduled until the disposition of the *Cassidy* case. No deadlines for fact or expert discovery have been set. No schedule for briefing summary judgment motions has been set. Accordingly, no dates for trials in these cases have been set. The next calendared event is a status conference before this Court scheduled for September 7, 2011. It appears highly unlikely that any of the above-captioned matters will go to trial before the year 2012.

6. Optionable agreed to pay M&O for billed services rendered in connection with each of the above-captioned litigations. Monthly, M&O prepared separate invoices for Optionable on each of the pending litigations (and on other unrelated matters) which invoices also were sent to Optionable on a monthly basis. Initially, these monthly invoices were paid out of a retainer paid by Optionable to M&O.

7. Beginning in or about May 2011, Optionable failed to pay M&O on the invoices sent to the Defendant. To date, Optionable has an aggregate of \$107,524.11 in unpaid legal fees and attendant costs. However, these invoices do not reflect unbilled work performed on behalf of the Defendant in the month of June 2011. Accordingly, Optionable's unpaid legal fees and costs are in fact higher than the billed amounts.

8. Over the course of the last few months, M&O has met with Optionable several times and conferred with Optionable regularly in a concerted effort to avoid a dispute over outstanding fees and to address the Defendant's stated concerns. M&O even made certain accommodations to set aside temporarily the amount of fees in dispute by Optionable, until such

matter could be resolved. Notwithstanding these efforts and accommodations, Optionable has failed to pay M&O's outstanding legal fees and costs. Upon information and belief, Optionable has the ability to pay M&O's outstanding invoices but simply refuses to do so.

9. Optionable also has failed to cooperate with M&O with regard to certain discovery matters, thereby making it impossible for M&O to continue to meet its obligations under the Federal Rules of Civil Procedure and as officers of the Court.

10. It has become clear that M&O likely will become adverse to the Defendant. In order to recover outstanding fees, M&O may be forced to assert a retaining lien on Optionable's files and/or take legal action against the Defendant. Therefore, we believe that an irreconcilable conflict has arisen between Optionable and M&O as a result of all of the foregoing.

11. M&O is a small firm comprised of less than fifteen attorneys. Our law firm already has accumulated \$107,524.11 in fees and costs, which remain outstanding, from its representation of the Defendant. None of the above-captioned litigations is likely to go to trial before the year 2012. To require M&O to continue to represent Optionable without being paid for the remainder of these litigations will result in an unreasonable financial hardship to M&O.

Dated: New York, New York
June 27, 2011

Respectfully submitted,

McCormick & O'Brien, LLP

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